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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1957

No. 12, Original

STATE OF CALIFORNIA, *Plaintiff,*

v.

STATE OF WASHINGTON, *Defendant.*

BRIEF OF THE STATE OF CALIFORNIA IN SUPPORT OF MOTION FOR LEAVE TO FILE A COMPLAINT.

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BRIEF OF THE STATE OF CALIFORNIA IN SUPPORT OF MOTION FOR LEAVE TO FILE A COMPLAINT.

By a Motion for Leave to File a Complaint, the State of California seeks to invoke the original jurisdiction of this Court in an action against the State of Washington. This brief is tendered in support of the motion.

JURISDICTION.

The parties to this proceeding are both states of the United States of America. Jurisdiction to hear

this case as an original proceeding in the Supreme Court of the United States is conferred by Article III, Section 2, Clause 2, of the United States Constitution. Further, the jurisdiction of this Court has been declared to be exclusive and the United States District Courts have been denied jurisdiction over controversies between two or more states by the terms of Title 28, Section 1251(a)(1) of the United States Code.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

Article I, Section 8, Clause 3, of the United States Constitution:

> "The Congress shall have Power
>
> ". . .
>
> "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;"

Article III, Section 2, Clause 1:

> "The judicial Power shall extend . . . to Controversies between two or more States; . . ."

Article III, Section 2, Clause 2:

> "In all Cases affecting ambassadors other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. . . ."

Article IV, Section 2, Clause 1:

> "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

Twenty-first Amendment, Section 2:

> "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

Title 28, Section 1251(a)(1), United States Code, 62 Stat. 927:

> "(a) The Supreme Court shall have original and exclusive jurisdiction of:
>
> "(1) All controversies between two or more States;"

The following numbered sections of the Revised Code of Washington, Title 66, comprising provisions of the Washington State Liquor Act: 66.04.110; 66.04.120; 66.04.360; 66.04.370; 66.08.020; 66.08.030; 66.08.050(5); 66.08.060; 66.16.010; 66.24.210; 66.24.370; 66.24.410; 66.24.440; 66.28.050; 66.44.030.

The following numbered Revised Rules and Regulations of the Washington State Liquor Control Board (Wash. State Printing Plant, 1956): Nos. 32(d), 66, 81, 113(d) and (e).

The provisions of these statutes and regulations of the State of Washington are lengthy. They are set forth in Appendix A to the Complaint herein.

The following numbered sections of the California Agricultural Code, all but Section 21 being provisions of the California Marketing Act of 1937: 21; 1300.10; 1300.11(d); 1300.12(c); 1300.12a; 1300.13(a); 1300.15(a); 1300.15(b)(8); 1300.17(b); 1300.17(f); 1300.19

(a). These provisions are lengthy. They are set forth in Appendix D to the Complaint herein.

QUESTIONS PRESENTED.

The Motion for Leave to File a Complaint raises the following issues:

1. Does the State of California have standing to sue and is it the real party in interest herein?

2. Is the State of Washington properly the defendant?

3. Is this Court the only proper forum for this case?

4. Do the substantive questions presented by the Complaint disclose a justiciable controversy between two states?

STATEMENT OF THE CASE PRESENTED BY THE COMPLAINT.

A summary statement of this case is set forth in paragraphs 1-5 of the Complaint. It is hereby incorporated herein by reference.

SUMMARY OF ARGUMENT.

I. This controversy arises out of conflict between the policies of the states of California and Washington, as embodied in their respective statutes. Washington has erected trade barriers against California

wine to provide economic protection to its own wine industry. Since 1938, California has used the facilities of its state government actively to promote the sale of California wine in lawful markets throughout the nation. To protect the "quasi-sovereign" rights inuring to it as a state which have been violated and injured by official acts of the State of Washington, California asserts her standing to sue herein on three grounds:

A. Under California law, the functions of the State and of private industry in the marketing of California wine are inseparable. The sales promotion activities of the State itself presently require expenditures of State funds at the rate of over $2,700,000 per year. About 80% of these activities are carried on outside of California. In every state where it is lawful to do so, State personnel work directly with wine wholesalers, training their salesmen and furnishing them with sales aids, merchandising displays and sales promotion literature intended for consumer use. These are in turn disseminated to wine retailers by the wholesalers. The State's activities lead directly to, and are a part of, negotiations for actual sales of California wine in interstate commerce. These State activities are entitled to the protection of the Commerce Clause against the unconstitutional discriminations practiced by Washington. In operation, these discriminations effectively preclude California from carrying on in Washington any of these sales promotion activities. California is not a mere volunteer; the need to protect its own functions and programs, assigned to it by law, give it standing to sue.

B. California has been assigned by its people the responsibility and duty of removing existing trade barriers against California wine. Obligated to discharge a responsibility properly entrusted to it by its people, it has the authority, correlative with that responsibility, to take appropriate action to protect the interests, tangible or intangible, so entrusted to its care. California's responsibility to take appropriate action concerning trade barriers arises from two sources, one, specific, the other, more general.

1. The California Marketing Act of 1937 (Calif. Agric. Code, § 1300.10, *et seq.*) declares that the marketing of California wine is affected with a public interest. It invokes the police powers of the State to provide both means and methods to prevent, modify or eliminate trade barriers which obstruct the free movement of California wine to market. This statutory purpose has been applied to the marketing of wine ever since 1938 by a State Wine Marketing Order. Having tried for many years, without success, to obtain the removal of the Washington trade barriers by amicable means, California has no other recourse but to invoke the original jurisdiction of this Court in this action.

2. California has also the responsibility of protecting its economy against unwarranted discriminations and of securing the general welfare and prosperity of its people. The Court's decisions in such cases indicate that the *quantum* of such injury is not as important in determining a state's standing to sue as the *nature* of the injury suffered (see

Georgia v. Pennsylvania R. R. Co., 324 U.S. 439, at 450-451). California's Complaint herein meets the established standards. The nature of the injury inflicted by Washington is of the utmost gravity. Washington has monopolized the distribution of California wine, fixed its prices at non-competitively high levels, and suppressed the promotion of its sale, but permits the marketing of Washington wine free of such economic strangulation. With agriculture the biggest industry in California, grapes are the largest and most valuable of all crops grown for human consumption. California production is five times as great as that of the other 47 states combined, producing $126,000,000 a year cash farm income in 1956 out of a national farm income from grapes of $148,000,000. California wine production is commensurate with that of its vineyards. The annual wine output is worth about $500,000,000 per year at the consumer level. The many years of direct and substantial assistance which California has given to its wine industry has given the State an interest therein which is more comprehensive and of a different character from that of the private parties connected with that industry.

II. The thrust of the complaint herein is solely at official acts of the State of Washington. These are: (1) Duly-enacted statutes, (2) properly-authorized rules and regulations of the Washington State Liquor Control Board, and (3) administrative actions of that Board acting within its statutory authority.

III. The original jurisdiction of this Court is the only proper forum for this controversy between two

states. Congress has made the jurisdiction of this Court exclusive in such cases (28 U.S.C., §1251(a)(1)). A suit between two states is, therefore, in a different category from cases wherein a state seeks to sue private parties. In the latter case there may be concurrent jurisdiction in the lower federal courts (see *Ames v. Kansas,* 111 U.S. 449). Further, there is no private litigation pending which involves the issues raised herein (*cf. Wisconsin v. Tennessee,* 350 U.S. 955).

IV. Bearing on the existence of a justiciable controversy herein are the substantive questions presented by the Complaint.

A. These questions are postulated upon the premise that Washington has granted to producers of Washington wine certain privileges with respect to its distribution and sale in that state. These are: (1) the privilege of distributing their wine, either directly or through privately-owned wholesalers of their own selection, to some 4,800 retail licensees, (2) the privilege of determining the prices at which their Washington wines shall be sold to retail licensees, and (3) the privilege of actively soliciting and promoting the sale of their Washington wine by direct contact with retail licensees and otherwise. The issue of substance raised by this case is whether, in such circumstances, Washington can then prescribe an entirely different economic system for the distribution and sale of California wine in that state by (1) subjecting its distribution to the monopoly control of the state, (2) using that state monopoly control to

fix prices for its sale at levels which make is non-competitive with Washington wine, and (3) denying to its producers in California the right either to solicit or promote its sale by direct contact with retail licensees in Washington. The two systems of distribution are thus the converse of each other.

B. The pivotal fact is that Washington does not prohibit its 4,800 retail licensees from selling, nor its citizens from buying and consuming California wine. At the critical point of supply to the consumer, Washington makes no classification and asserts no restriction based upon the origin of wine. The discriminations against California wine at the distributive level are not, therefore, in aid of a legitimate control of the liquor traffic. Their objective is not prohibition, not temperance, but economic localism.

C. It is California's position that the discriminations practiced by Washington violate both the Privileges and Immunities Clause of Article IV, Section 2, and the Commerce Clause, and are neither authorized nor justified by the Twenty-first Amendment.

1. About 60% of the 261 producers of California wine are individual citizens of California. By virtue of Article IV, Section 2, they are entitled to whatever privileges of trade and commerce Washington has granted to its own citizens. The privileges that Washington has seen fit to grant to its own citizens in distributing, marketing, pricing and promoting the sale of wine produced by them in Washington, "neither more nor less, shall be the measure of the rights of citizens of other states" (*The Slaughterhouse*

Cases, 83 U.S. 36, 77; *Ward v. Maryland,* 12 Wall. 418). The discriminations against California wine involve the denial to California citizens of trade privileges granted by Washington to its own citizens. Hence, they violate the Privileges and Immunities Clause of Article IV, Section 2.

2. Washington also violates the Commerce Clause (*Baldwin v. Seelig,* 294 U.S. 511) in a manner not sanctioned by the Twenty-first Amendment. Dual and discriminatory marketing systems were not involved in any of the Court's prior decisions construing the Commerce Clause in the light of the Amendment. In *State Board of Equalization v. Young's Market,* 299 U.S. 59, 62, the Court found that "The case does not present a question of discrimination prohibited by the commerce clause". *Mahoney v. Joseph Triner Corp.,* 304 U.S. 401, which did involve a form of discrimination against interstate commerce, was considered solely as an equal protection case under the Fourteenth Amendment; consideration of the Commerce Clause was not involved. The unique facts of this case make it unnecessary to ask the Court to overrule any of its prior decisions construing the Twenty-first Amendment. The Amendment adopted the phraseology of the Webb-Kenyon Act (27 U.S.C. § 1) which had previously been construed as not authorizing discrimination of the type here involved (e.g., *Brennan v. Southern Express Co.,* 106 S.C. 102, 90 S.E. 402). The purpose of the Amendment was to elevate to constitutional status the policy as well as the provisions of the antecedent Webb-Kenyon Act. Since

the Amendment is in derogation of the principle of national economic unity which pervades so many of the other provisions of the Constitution, its construction should be limited to its specific purpose. It does not wholly nullify the Commerce Clause as a limitation upon state power (*Young's Market,* supra, 299 U.S. at 64). A presently undefined residual limitation remains, after giving full effect to the intendment of the Twenty-first Amendment (*United States v. Frankfort Distilleries, Inc.,* 324 U.S. 293, 299). The issues raised herein are open. It is still pertinent to inquire whether state liquor legislation bears any real and substantial relation to its constitutional objectives (*Cf. Mahoney v. Triner,* supra, where the question was the political question of the reasonableness of the regulation, the relationship to its ostensible objective apparently being assumed.) The systematic discriminations by Washington are not founded upon considerations of the health, safety and morals of the people of that state in their use and consumption of alcoholic beverages. It is a complete balkanization of the traditional American economic system. California submits that for this the Twenty-first Amendment is no warrant.

ARGUMENT.

I.

THE STATE OF CALIFORNIA HAS STANDING TO SUE AND IS THE PROPER PARTY IN INTEREST HEREIN.

". . . The original jurisdiction of this Court is one of the mighty instruments which the framers

> of the Constitution provided so that adequate machinery might be available for the peaceful settlement of disputes between States. . . . *Trade barriers,* recriminations, *intense commercial rivalries* had plagued the colonies. The traditional methods available to a sovereign for the settlement of such disputes were diplomacy and war. Suit in this Court was provided as an alternative."
>
> *Georgia v. Pennsylvania R. Co.,* 324 U.S. 439, 450 (emphasis added).

The Complaint herein discloses a controversy between two states of the type which lead to the creation of the original jurisdiction of the Court, viz.: The State of Washington has acted and is acting to provide economic protection to its own wine industry by erecting discriminatory trade barriers against the movement in interstate and foreign commerce into that state of the competing products of other states, notably California; and

Since 1938 the State of California has carried on, with the facilities of its state government, activities of a commercial nature to promote the sale and consumption of California wine. These activities are carried on in every state of the Union which does not prohibit the purchase and consumption of wine by its citizens and which permits such sales promotion activity. Further, the State has been charged by law with the duty of preventing, modifying or removing trade barriers against the free movement of California wine to market. Its policy in this regard is founded upon the premise, implicit in the Con-

stitution of the United States, that the several states comprise one economic entity.

> "It means that in the matter of interstate commerce we are a single nation—one and the same people."
>
> *Pennsylvania v. West Virginia,* 262 U.S. 553, 596.

The State of California, however, is unable to carry on its promotion of the sale of California wine in Washington because of the practical effect in operation of the official acts of the State of Washington complained of herein. For many years it has sought to have the resulting controversy resolved by amicable methods but without success.

In seeking leave to file its Complaint, the State of California is acting on its own behalf. It is compelled to do so to assert and to protect so-called "quasi-sovereign" rights which inure to it as a state and which are "independent of and behind the titles of its citizens." See *Georgia v. Tennessee Copper Co.,* 206 U.S. 230, 237.

The quasi-sovereign rights and interest so asserted by the State of California are:

First: Its right as a state to perform functions of government in behalf of its people and in so doing to remain unrestricted and unhampered by official acts of another state which contravene the Constitution of the United States;

Second: Its right to discharge by appropriate action the obligation and duty imposed upon it by

statute to remove existing trade barriers against the sale of California wine in Washington which have no sanction in the Twenty-first Amendment; and,

Third: Its right to protect its economy against unwarranted discriminations by another state and to obtain unobstructed access to the national market for a natural resource and industry which is so essential to the economy of the State that it is declared by law to be affected with a public interest.

A. LEGITIMATE GOVERNMENTAL FUNCTIONS OF THE STATE OF CALIFORNIA ARE DIRECTLY AFFECTED AND RESTRICTED BY THE WASHINGTON STATUTES AND REGULATIONS COMPLAINED OF.

This case is unique in the history of suits between the states in one respect. This bears directly upon the standing of the State of California to sue.

Herein the State of California asserts the right to remain free of discriminatory legislation of another state in carrying on, outside of its own boundaries, interstate activities of a commercial nature to promote the sale of a commodity in interstate commerce. It contends that this aspect of its Complaint is itself sufficient to warrant the granting of leave to file it. None of the prior decisions of this Court concerning its orginal jurisdiction have involved any comparable activity on the part of the complainant state.

1. The wine sales promotion program is that of the State of California.

It is the sales promotion program and activity *of the State itself* which is frustrated by the official actions of the State of Washington.

Under California law, in the distribution and marketing of California wine the functions of the State and of private industry are inexorably intertwined. The $2,700,000 to be spent during the current fiscal year for the State's program of wine sales promotion are obtained by levying a special form of excise tax upon every gallon of California wine prepared for market. It is the State and state officials who are in charge of its expenditure and the resulting activities. It is the State which bears the responsibility for the program, a responsibility which it must, under its laws, discharge, and which it cannot compromise or surrender. If trade barriers obstruct the realization of its program, both the statute and the Wine Marketing Order issued pursuant to its mandate declare that it is the function of the State to see that they are removed. Hence, it is the State which suffers the injury whenever and to the extent that trade barriers, such as those erected by the State of Washington, effectively prevent its promotion of the sale of California wine. Reference to the provisions of the California Marketing Act of 1937 make this readily apparent.

The administration and enforcement of the State's wine advertising and sales promotion program is a function and responsibility of the California Director

of Agriculture, hereinafter called the Director (Calif. Agric. Code §§ 1300.13(a), 1300.19; all section references herein are to this Code). The Director is the executive in charge of the State Department of Agriculture and is appointed by the Governor (§ 21). He is authorized to prepare, issue, administer and enforce plans for promoting the sale of California wine (§§ 1300.12a; 1300.15(b)(8)). Only the Director has authority to issue a marketing order such as that for promoting wine sales and he is empowered to enforce its provisions throughout California (§ 1300.13(a)). He appoints an Advisory Board to assist him in the administration of his order, but its duties are administrative only and subject to his approval (§ 1300.15(a)).

The statute requires that the Wine Marketing Order provide "for the levying and collection of assessments in sufficient amounts to defray the expenses of" advertising and sales promotion activities approved by the Director. Before this special form of excise tax on California wine can be levied and collected, the director is required to approve an annual budget covering such expenses (see Appendix B of Complaint). The statute fixes the minimum assessment rate permissible (§ 1300.17(b)). Failure to pay such assessments is a misdemeanor punishable by fine or imprisonment (§ 1300.19(a)). The collection of such assessments has been upheld by the Courts as a valid exercise of the State's police power (*People v. Sunnyside Winery, Inc.*, unreported, Fresno (Calif.) Superior Court No. 80057 (1950)). The constitutionality

of the California Marketing Act of 1937 is generally assumed in view of *Agricultural Prorate Commission v. Superior Court,* 5 Cal. 2d 550; see *Parker v. Brown,* 317 U.S. 341. Legislation in other states providing for comparable state trade promotion activities has been upheld in *C. V. Floyd Fruit Co. v. Florida Citrus Commission,* 175 Sou. 248 (Fla. 1937); *Miller v. Michigan State Apple Commission,* 296 N.W. 245 (Mich. 1941); *State v. Enking,* 82 Pac. 2d 649 (Idaho, 1938). Judgments for the collection of California wine assessments have been recognized as "tax claims" of the State under the National Bankruptcy Act (*In the Matter of Sunnyside Winery,* unreported, Bankruptcy No. 7056, S.D. Calif. (1954)). The United States Internal Revenue Bureau considers the monies so collected as being "government funds" of the State of California.

When collected, the funds are held by the Director and are disbursed by him only for expenses which have been approved by him with respect to the wine sales promotion program (§1300.17(f)). In short, the program described in the Complaint (par. 42-46) is that of the State of California and all activities pursuant thereto are official acts of the State.

2. The State's sales promotion program is carried out largely outside of California.

About 80% of all California wine moves in interstate commerce and is sold and consumed in states other than California. A commensurate part of the State's promotion of these sales is carried on outside of California.

The State's program is conducted largely by 23 field service representatives, 19 of whom are permanently stationed outside of California, from Wrentham, Massachusetts, to Portland, Oregon; and from Pontiac, Michigan, to Miami, Florida. Offices are maintained in New York City and Chicago. A branch warehouse for the eastern distribution of graphic sales aids and informational literature is in New York.

3. The State's sales promotion activities are commercial in nature.

The wine sales promotion activities of the State are those of a commercial or industrial organization promoting nation-wide sales of its products, or of a trade association of such organizations. California law restricts the nature of the State's activities in only two respects: It forbids the disparagement of other agricultural commodities and the making of false claims, and it requires that the activities shall be directed toward increasing the sale of California wine "without reference to a particular brand or trade name (Calif. Agric. Code § 1300.15(b)(8)).

The State's activities are detailed in paragraphs 42-46 of the Complaint, and an analysis of the current budget therefor is Appendix B thereto. Suffice it here to point out the similarity between one major aspect of the State's program and the sales promotion activities in Washington, authorized by the laws of that State, which are carried on by producers of Washington wine. Both utilize the services of wine wholesalers as an agency or medium in distributing to retailers sales aids, merchandising displays and sales

promotion literature intended for consumer use (*cf.* Complaint, pars. 11 and 46).

4. The State's program is of such a nature as to entitle it to invoke the protection of the Commerce Clause.

The objective of the California statute and the State's activities pursuant to the Wine Marketing Order is "to create new or larger markets" for California wine. This cannot be achieved without thereby actually increasing trade and commerce among the states. The State's promotion work is inseparably and directly related to the sale of California wine in interstate commerce.

> " 'Commerce, undoubtedly, is traffic, but it is something more: it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches.' Commerce is interstate [Chief Justice Marshall] said, when it 'concerns more states than one.' . . . No decision of this Court has ever questioned this as too comprehensive a description of the subject matter of the Commerce Clause."
>
> *United States v. South-Eastern Underwriters Assn.,* 322 U.S. 533, 550-551, quoting from *Gibbons v. Ogden,* 9 Wheat. 1, 189-190, 194.

It is commercial intercourse between the states when 18 of the California field service representatives are each assigned an area comprising two or more states, in whole or in part, throughout which to travel and promote the sale of wine produced in and to be shipped from California (*cf. Real Silk Hosiery Mills v. City of Portland,* 268 U.S. 325, 335).

Essential elements of the State's program are the interstate distribution of large quantities of sales aids, merchandising displays, and informational literature; the interstate transportation of motion picture films for exhibition to wine distributors and prospective customers; and the interstate movement of wine from California producer to consumers at the State's wine demonstrations, instructional classes for wine salesmen, and "wine tastings". All these are elements of trade and commerce among the states. Their use by wholesale distributors and other sellers of California wine is solicited and arranged for by the State's field service representatives. They play an important role in the negotiations for and solicitations of actual sales of California wine by such wholesale distributors and other sellers.

Describing the reach of the Commerce Clause, the Court has said that:

> ". . . half a dozen enactments, other than the National Labor Relations Act, are sufficient to illustrate that when [Congress] wants to bring aspects of commerce within the full sweep of its constitutional authority, it manifests its purpose by regulating not only 'commerce' but also matters which 'affect', 'interrupt', or 'promote' interstate commerce" (*Polish National Alliance v. National Labor Relations Board,* 322 U.S. 643, 647).

For the purpose of obtaining leave to file the Complaint herein it is not necessary to determine whether the State's sales promotion activities are "in commerce" between the states, or whether they merely

"affect" or "promote" such commerce. However, the full extent of Congressional power to regulate under the Commerce Clause is also the measure of the scope of the protection granted against state legislation which discriminates against such commerce. Certainly, it is the measure to be applied in determining the standing of the State of California to file its Complaint herein.

The interstate nature of the sales promotion activities of the State of California clearly distinguishes its situation from that of the complainant State of Louisiana in *Louisiana v. Texas,* 176 U.S. 1, concerning which the Court said:

> ". . . Inasmuch as the vindication of the freedom of interstate commerce is not committed to the State of Louisiana, and that state is not engaged in such commerce, the cause of action must be regarded, not as involving any infringement of the powers of the state of Louisiana, or any special injury to her property, but as asserting that the state is entitled to seek relief in this way because the matters complained of affect her citizens at large" (176 U.S. 1, at 19).

The State of California is not, under the allegations of the complaint a "mere [volunteer] seeking to vindicate the freedom of interstate commerce," *Pennsylvania v. West Virginia,* 262 U.S. at 591. The need to protect its own function as a state, in performing the duties assigned to it by law, give it standing to sue in this action.

B. THE STATE OF CALIFORNIA HAS A RESPONSIBILITY TO COMBAT TRADE BARRIERS AND TO PROTECT ITS ECONOMY AGAINST UNWARRANTED DISCRIMINATIONS BY ANOTHER STATE.

Quite aside from the right to protect its own program of sales promotion activities, the State of California has another basis for filing its Complaint. This is the right to file its Complaint as a necessary and appropriate action to protect the economy of the State from interstate trade barriers and from unwarranted discrimination by another state. Under the circumstances outlined below, it has the right to do so because it has an obligation, a responsibility and the duty to do so.

In all cases dealing with its original jurisdiction the Court has examined into the nature of the interest of the complaining state—"the essential quality of the right asserted" (*Massachusetts v. Missouri,* 308 U.S. 1, 18).

In the cases involving the assertion of "quasi-sovereign" rights the test is primarily whether the complaining state is acting to discharge a responsibility properly entrusted to it by its people. Authority is correlative with responsibility. From the decided cases it is clear that the state has no standing to sue if it is merely a volunteer having no responsibility concerning the subject matter of the litigation. But where the state is charged with a duty or given a responsibility by its people, the authority to take appropriate action in furtherance thereof is a necessary consequence. This principle has been clearly stated by the

Court in terms that apply to the states as well as to the Federal Government, viz.:

> ". . . Every government, entrusted, by the very terms of its being, with powers and duties to be exercised and discharged for the general welfare, has a right to apply to its own courts for any proper assistance in the exercise of the one and the discharge of the other, and it is no sufficient answer to its appeal to one of those courts that it has no pecuniary interest in the matter" (*In re Debs,* 158 U.S. 564, 584).

Thus, in the air pollution case, *Georgia v. Tennessee Copper Co.,* supra, 206 U.S. at 237, it was found that the state had an actionable interest in all the earth and air within its domain. Grievous injury to the health, comfort and prosperity of the people of a state caused by the official acts of another state was relied upon to uphold state action seeking relief in the cases involving water pollution (*Missouri v. Illinois,* 180 U.S. 208, at 241; *New York v. New Jersey,* 256 U.S. 296, at 301-302); the deprivation of stream flow (*Kansas v. Colorado,* 185 U.S. 125, at 142); the curtailment of interstate commerce in gas (*Pennsylvania v. West Virginia,* supra, 262 U.S. at 592); the flooding of land by drainage ditches (*North Dakota v. Minnesota,* 263 U.S. 365, 374). Injury to the economy of the state and to the welfare of its citizens was the basis of the right to sue for relief against discriminatory freight rates in *Georgia v. Pennsylvania R.R. Co.,* supra, 324 U.S. at 450. In *Wyoming v. Colorado,* 286 U.S. 494, 503, the Court found that the interest

of the complainant state affected by the diversion beyond its boundaries of water which it was accustomed to receive was "indissoluably linked with the rights of the appropriators."

Tacitly running through the opinions of the Court in all these cases is the thought that where the state bears an established responsibility to its people, it has the correlative authority to protect the interests, tangible or intangible, so intrusted to its care.

In the instant case the responsibility and duty of the State of California to take appropriate action to remove the trade barriers erected by the State of Washington arises from two separate and distinct sources: one specific, arising out of statute, and the other more general.

1. The specific responsibility of the State to remove trade barriers.

The first of these arises from the express terms of the California Marketing Act of 1937. That act declares that the marketing of wine within California is affected with a public interest. It invokes the police powers of the State to protect the health, peace, safety and general welfare of the people of California (Calif. Agric. Code §§ 1300.10 (c); 1300.12 (a)). The purpose of the act, among other things, is

> "(d) To provide methods and means for the maintenance of present markets or for the development of new or larger markets for [California wine] . . . or for the prevention, modification or elimination of trade barriers which obstruct the free flow of such [California wine] to market" (Calif. Agric. Code, § 1300.11 (d)).

This purpose is carried forward into the specific authorization for the advertising and sales promotion program of the State concerning California wine (§ 1300.15 (b)(8)) and into the terms of the Wine Marketing Order itself (Complaint, par. 40). The latter provides, among other things, for:

> ". . . expansion activities for the prevention, modification or elimination of trade barriers which restrict the free flow of wine produced in California to market, including the presentation of facts to and negotiations with State, Federal or foreign governmental agencies on matters which affect the marketing of wine produced in this state; also such other plans as may be recommended by the Board and approved by the Director pursuant to this Marketing Order, as amended; . . ." (Marketing Order for Wine, as amended, Art. III, Sec. A).

In an effort to discharge the responsibility thus entrusted to it by its people, the State of California has made prolonged and sincere efforts to convince the people of the State of Washington, their elected representatives and their other public officials, of the need for the removal of the trade barriers against California wine which it has erected. In this effort it has expended substantial sums of public monies of the State. Nothing, however, has been accomplished by amicable means to eliminate or even mitigate the trade barriers alleged in the Complaint, all of which have been in effect at least since 1951.

It is significant that the California Marketing Act of 1937 was enacted several years before the State of

Washington devised some of the most onerous of the trade barriers it has erected against California wine (Complaint, par. 26-27). The California statute is not "make-weight" legislation designed for the express purpose of invoking the original jurisdiction of the Court in this case. *Cf. New Hampshire v. Louisiana,* 108 U.S. 76. On the contrary, it established more than twenty years ago, a broad public policy that has since been effectuated by the State throughout the wide range of agricultural enterprises which comprise California's biggest business and means of livelihood. To date, the State has spent over $25,000,000 in its wine promotion program alone. Expenditures on behalf of other aspects of its grape and vineyard industry would swell this figure by several millions more.

In these circumstances, having surrendered, upon its admission to the Union as a state, its historic prerogative of recourse to diplomacy or war, the State of California necessarily turns to the one forum provided by the Founding Fathers at Philadelphia for the settlement of controversies between the states.

> "Bound hand and foot by the prohibitions of the Constitution, a complaining State can neither treat, agree or fight with its adversary [state] without the consent of Congress; a resort to the judicial power is the only means left for legally adjusting, or persuading a State which has possession of disputed territory, to enter into an agreement or compact relating to a controverted boundary."
>
> *Rhode Island v. Massachusetts,* 12 Pet. 657, 726.

The statement is as true concerning disputed boundaries of state conduct as it is concerning boundaries of state territory.

2. The general responsibility of the State to protect its economy and the welfare of its people.

In addition to the foregoing, the State of California also has the more general, but nonetheless definite responsibility of taking appropriate action to make secure the general welfare and prosperity of its people. These functions of state government have long been recognized by the Court as an adequate and proper basis for the filing of an action such as this within its original jurisdiction (See cases cited, ante p. 23).

There is no tightly-phrased rule of universal application by which to test the adequacy of a state's standing to sue on the basis of injury to the prosperity and welfare of its people. The decisions stand pretty much on the facts of each case. There is one conclusion, however, which we believe can be fairly drawn from the reasoning in the Court's opinions. That is, that the quantitative extent of the injury inflicted upon the complaining state is far less important than the nature of the injury alleged—the quality of the actions of the respondent state.

Thus, in none of the cases in which leave to file was granted on the basis of injury to health, comfort and welfare of the people of the complaining state was that state affected in its geographical entirety, nor were all its people directly affected, nor was its entire economic structure injured. In *Kansas v. Colorado,* supra, it was only the "large tract of

land bordering on the Arkansas River" which was involved. Likewise, only a small part of the Empire State was affected by the water pollution at issue in *New York v. New Jersey,* supra. Only the extreme northwestern corner of Georgia was injured by the air pollution involved in *Georgia v. Tennessee Copper Co.,* supra. While natural gas was an important source of energy to the people of Pennsylvania in *Pennsylvania v. West Virginia,* supra, it was not the only source of energy available. In *Georgia v. Pennsylvania R.R. Co.,* supra, the discriminatory freight rates involved were only one element, albeit an important one, in the cost and market value of commodities shipped into and out of the State of Georgia.

The *quantum* of the injury necessary to confer standing to sue thereon has never been defined; in all probability it is undefinable. On this score, we have found no more definite expressions by the Court than its admonition that "the threatened invasion of rights must be of serious magnitude" *(New York v. New Jersey,* supra, 256 U.S. at 309) and conclusionary statements such as "These are matters of grave public concern" *(Georgia v. Pennsylvania R.R. Co.,* supra, 324 U.S. at 451).

On the other hand, in examining the precedents, the Court has considered at length the *nature of the injury* to the welfare, prosperity and economy of the complaining state. Concerning the immediate and direct effect of trade barriers it has said:

> "If the allegations of the bill are taken as true, the economy of Georgia and the welfare of

her citizens have seriously suffered as the result of this alleged conspiracy. Discriminatory rates are but one form of trade barriers."

(The Court had just referred to its responsibility under the Constitution to provide a forum for the settlement of disputes concerning trade barriers to which a state is party.)

"They may cause a blight no less serious than the spread of noxious gas over the land or the deposit of sewage in the streams. They may affect the prosperity and welfare of a State as profoundly as any diversion of water from the rivers. They may stifle, impede, or cripple old industries and prevent the establishment of new ones. They may arrest the development of a State or put it at a decided disadvantage in competitive markets. Such a charge at least equals in *gravity* the one which Pennsylvania and Ohio had with West Virginia over the curtailment of the flow of natural gas from the West Virginia fields. . . . These are matters of grave public concern in which Georgia has an interest apart from that of particular individuals who may be affected. . . . If we denied Georgia as parens patriae the right to invoke the original jurisdiction of the Court *in a matter of that gravity*, we would whittle the concept of justiciability down to the stature of minor or conventional controversies. There is no warrant for such a restriction" *(Georgia v. Pennsylvania R.R. Co.*, supra, 324 U.S. at 450-451; emphasis added).

Insofar as the Complaint here is based upon injury to the economy of California and the welfare and

prosperity of its people, it meets all of these standards. There can be no greater control over a product *which is in a lawful market* than to monopolize its distribution, fix its prices at a non-competitively high level, and suppress the promotion of its sale and beneficial use. That is what the State of Washington has done to California wine (but not Washington wine), the consumption and use of which is not prohibited to the people of that state.

Quantitatively, the resulting injury to the economy of California is great, on the basis of both the absolute values inherent in the vineyard and wine industry of California and the relative importance of such industry to the over-all economy of the State.

Agriculture and its related food processing industry towers in importance above all other business enterprises in California. Of all the crops grown in California for human consumption, grapes are the largest in both tonnage and dollar value. The 500,000 acres devoted to vineyards and the associated winery properties exceed 500 million dollars in value. Farm income from grapes has averaged about 120 million dollars a year in recent years. Between 40% and 60% of California grapes are devoted to wine production. During the past ten years, California has produced an annual average of 115 million gallons of wine; all other states of the United States produce an annual average of about 16 million gallons. The value of the product of California wineries at the consumer level is just short of $500,000,000 a year.

All of the foregoing considerations were before the California legislature in 1955, when it adopted the Concurrent Resolution which is Appendix C to the Complaint. Therein the California Legislature recited the role of *parens patriae* in which the State of California has in fact and in law functioned over the decades with respect to its grape and wine industry. In developing and promoting its wine industry, as alleged in paragraphs 39-50 of the Complaint, the State has acquired an interest therein which is more comprehensive and of a different character than that of the individuals and private parties immediately concerned therewith. We submit it has standing to protect that interest.

II.

THE CONTROVERSY HEREIN IS WITH THE STATE OF WASHINGTON.

Bearing on the question of the existence of a justiciable controversy between two states is the fact that it is the official acts of the State of Washington which are complained of. These consist of: (1) Statutes duly enacted by the Washington Legislature, (2) rules and regulations promulgated by the Washington State Liquor Control Board within and pursuant to its statutory authority, and (3) administrative actions by that Board acting within the discretionary authority conferred upon it by the Washington statutes (Complaint, pars. 20, 25, 30).

There is no question here of the "mal-administration" of state laws by an irresponsible or unauthorized official. Neither is there any question of the absence of official confirmation or ratification by the respondent state of the acts of its agents, such as controlled the decision of this Court in *Louisiana v. Texas,* 176 U.S. 1, 22-23. Compare: *Arkansas v. Texas,* 346 U.S. 368, 370-371; *Kansas v. Colorado,* 185 U.S. 125, 142; *Missouri v. Illinois,* 180 U.S. 208, 242; *New York v. New Jersey,* 256 U.S. 296, 302; where the action complained of was state action and the jurisdiction of the Court upheld.

III.

THIS COURT IS THE ONLY PROPER FORUM OF A CONTROVERSY BETWEEN TWO STATES.

A. CONGRESS HAS MADE THE COURT'S JURISDICTION OVER THIS CASE EXCLUSIVE.

We are not unmindful of the circumstances which require the Court to protect its appellate docket (see dissenting opinion of Chief Justice Stone, *Georgia v. Pennsylvania R. R. Co.,* supra, 324 U.S. at 470). Where a state seeks to invoke the original jurisdiction of the Court, the Court's concern over the availability of another forum is quite to the point.

It has been held from an early date that the grant of original jurisdiction to the Court by Article III, Section 2, Clause 2, of the Constitution is not exclusive (*United States v. Ravara,* 2 Dall. 297). In *Ames v. Kansas,* 111 U.S. 449, 469, 472, it was held that Con-

gress is authorized to grant to the lower federal courts jurisdiction in cases where this Court is vested by the Constitution with original jurisdiction. If Congress has the power to grant to the lower federal courts concurrent jurisdiction with this Court over controversies between two states, Congress also has the power to withhold such grant.

At all times since the enactment of the Judiciary Act of 1789, Congress has provided that concerning *controversies between two or more states,* the jurisdiction of this Court shall be original and *exclusive.* The present statute provides:

> "(a) The Supreme Court shall have original and exclusive jurisdiction of:
>
> (1) All controversies between two or more States;"
>
> (28 U.S.C. § 1251(a)(1).)

To date this Court has never denied its original jurisdiction to a controversy between two states in an otherwise proper case on the ground that there was another forum available. The remarks of the Court in *Georgia v. Pennsylvania R. R. Co.,* 324 U.S. at 464-465 concerning its discretionary power to withhold its original jurisdiction from a complainant state is, of course, to be taken in the context of that case which did not involve a controversy between states. The authorities relied upon do not indicate differently. In *Massachusetts v. Missouri,* supra, the Court's remarks about an alternative forum in state or lower federal courts (308 U.S. at 18) were not made with reference to any controversy between the two states (see 308

U.S. at 15). They related only to Massachusetts' right to sue three citizens of Missouri who had also been named as defendants in the complaint.

Where, as here, the controversy is between two states, the question of an alternative forum is, more precisely, the question of an alternative *federal* forum. The reason why the judicial power of the United States includes controversies between two or more states has been recognized by the Court in these words:

> ". . . 7th. To controversies between two or more states; because domestic tranquility requires that the contentions of states should be peaceably terminated by a common judicatory; and, because, in a free country justice ought not to depend on the will of either of the litigants. . . ."
>
> (Chief Justice Jay, in *Chisholm v. Georgia,* 2 Dall. 419, 475.)

B. THE QUESTIONS OF LAW MUST ULTIMATELY BE DECIDED BY THIS COURT.

The questions of law raised by the Complaint arise directly from the Constitution of the United States. In such matters, this Court is, of course, the final arbiter. Hence, the commencement of this case in any other court, if, indeed, any other court has jurisdiction, would only postpone submission of the matter to this Court, after delays costly in both time and money to both parties. This is especially so in view of the fact that, concededly, the State of California has the burden herein of convincing the Court of the need for some modification of expressions which appear in its

prior opinions construing the Twenty-first Amendment.

C. THERE IS NO PRIVATE LITIGATION INVOLVING THE ISSUES HEREIN.

It has been argued in other cases that the Court should not exercise its original jurisdiction in a controversy between states where private litigation involving the same issues is pending (*cf. Wisconsin v. Tennessee,* 350 U.S. 955, mem. dec. denying leave to file). Here, however, no such suit is pending in any court. Moreover, investigation has revealed that it is unlikely in the extreme that a private case involving the issues raised herein will ever be brought. This is a natural consequence of the present Washington law under which the State Liquor Control Board is the only purchaser of California wine in Washington. The Board has the uncontrollable discretion of ceasing to buy or refusing to buy wine from any California supplier for any reason, or even without giving a reason. The Board's regulations specifically provide for the removal from its sales list of the products of any wine producer violating Board regulations such as its prohibition against such producer contacting any retail licensee within the State of Washington "by mail or otherwise" (Wash. Liq. Cont. Bd. Reg. No. 113(d) and (e)). While such restriction upon the use of the United States Mails and the discrimination herein complained of might seem to be provocative of protest by California wine producers, the practical consequences of the monopoly control of distribution to which California wine (but not Washington wine) is

subjected in Washington are far-reaching. The threat of administrative curtailment of purchases or refusal to purchase a particular brand of California wine is and will continue to be an effective deterrent to private litigation.

For all of the foregoing reasons, the Complaint herein complies with the standards which have been evolved by the Court concerning the exercise of its original jurisdiction.

IV.

THE SUBSTANTIVE QUESTIONS PRESENTED BY THE COMPLAINT.

A. THE COMPLAINT SHOWS A JUSTICIABLE CONTROVERSY ARISING FROM WASHINGTON'S ECONOMIC DISCRIMINATIONS AGAINST CALIFORNIA WINE.

California seeks jurisdictional leave to file its complaint in this proceeding in order to raise a single issue of substance, viz.:

Can a state, which does not prohibit the use and consumption of wine by its citizens, prescribe *a wholly different economic system* for the distribution, marketing, pricing and sales promotion of wine produced within that state than for wine produced elsewhere, and thereby confer economic and competitive advantages upon locally produced wine which are denied to wine produced elsewhere?

This general question can be subdivided as follows:

(1) Where a state grants to local wine producers the privilege of distributing and selling their wine,

either directly or through privately-owned wholesalers of their own selection to some 4,800 retail licensees, can that state monopolize the distribution and sale of all wine produced elsewhere which moves into the state in interstate and foreign commerce?

(2) Where a state grants to local wine producers and to retail licensees the privilege of determining the prices at which their respective sales of locally produced wine shall be made, without any state control over the level of such prices, can that state use a monopoly power over the distribution of wine produced elsewhere to fix prices for its sale at levels which make it non-competitive with wine produced locally, and which destroy the economic incentive of licensed retailers to deal in such out-of-state wines?

(3) Where a state confers upon local wine producers the privilege of actively soliciting and promoting the sale of locally produced wine by direct contact with licensed retailers and otherwise, can that state deny to producers of out-of-state wines the privilege of likewise soliciting and promoting the sale of their respective products by the same means, methods and practices which are permitted with respect to wine produced locally?

The statutes, regulations and other official acts of the State of Washington which give rise to these questions are set forth in the Complaint, paragraphs 18-34. The practices and operations of the favored wine industry of Washington within this discriminatory scheme of regulation are described in the Complaint, paragraphs 6-17. They need not be repeated here.

It will be the position of California on the merits of this important controversy that the discrimination is unconstitutional by virtue of the Commerce Clause and of the Privileges and Immunities Clause of Article IV, Section 2.[1]

B. WINE IS A LAWFUL OBJECT OF COMMERCE IN WASHINGTON.

Before analyzing the nature of this controversy, it should be clearly stated that in this action California does not contend for any limitation on the power of each state, in the light of the Twenty-first Amendment, to determine to what extent, if any, the movement into that state of any alcoholic beverage should be permitted. Neither is there any plea for limitation on the power of a state to regulate and control any activity which is fairly and substantially related to the objectives of its policy concerning the use and consumption of alcoholic beverages by its citizens (see concurring opinion of Justice Frankfurter, *Carter v. Virginia*, 321 U.S. 131, 139).

Undoubtedly, a state may monopolize the sale and distribution of all alcoholic beverages to its citizens. But this, the State of Washington has not done. Undoubtedly, a state may fix and determine the prices at

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[1]California reserves but, in respect to the Motion for Leave to File a Complaint now before the Court, does not press the contention that the discrimination is also in conflict with the Equal Protection Clause of the Fourteenth Amendment. See Complaint, par. 37. It is California's position that no prior decision validates such a system of economic discrimination in favor of local industry under either the Commerce or the Privileges and Immunities (Art. IV, Sec. 2) Clauses, but that the issue under the Equal Protection Clause may have been partially foreclosed by what was said in *Mahoney v. Joseph Triner Corp.*, 304 U.S. 401.

which all alcoholic beverages shall be sold to its citizens. But this, likewise, the State of Washington has not done.

Important is this: Washington has licensed some 4,800 retailers to sell wine to consumers and does not forbid these retail licensees to sell, nor forbid the consuming public to buy, California wine. In short, at the critical point of supply to the consumer, Washington makes no classification and asserts no restriction based upon the place of origin of wine. It therefore cannot be said that a difference in the place of origin of wine, on which the discriminations at the distribution level here challenged are based, has any relation to the health, safety or morals of Washington citizens. The Washington system is not in aid of state control of the liquor traffic.

The Court, in short, will here be concerned with a regulatory system of discriminations which do not limit, forbid or control the use and consumption of alcoholic beverages. It will be faced, instead, with the much different issue of discriminations in economic competition between the products of two states at the level of production and distribution. The sole motivation and effect of the Washington regulatory system is not prohibition but economic localism. The controversy here arises from the denial to California citizens of privileges expressly granted by the State of Washington to its own citizens, and from the discriminations practiced by the State of Washington against California wine lawfully admitted into Washington in favor of Washington wine.

C. THE WASHINGTON SYSTEM VIOLATES THE COMMERCE CLAUSE AND THE PRIVILEGES AND IMMUNITIES CLAUSE OF ARTICLE IV, SECTION 2, AND IS NOT SANCTIONED BY THE TWENTY-FIRST AMENDMENT.

Throughout the Constitution the theme of economic unity in the nation is second in importance only to the personal guarantees embodied in the Bill of Rights. No other aspect of American institutions and life pervades so many different provisions of the Constitution. The Commerce Clause is only one of its manifestations. It is implicit in the Preamble. It is explicit in every one of the powers granted to Congress by Article I, Section 8, excepting only matters relating to national defense and the establishment of lower Federal courts. It is involved in the Privileges and Immunities Clause of Article IV, Section 2, and in the Fourteenth Amendment.

The constancy of this theme of economic unity has a direct bearing upon the proper scope of the Twenty-first Amendment. That amendment broke with precedent for a specific purpose. Its effect upon the existing provisions of the Constitution is as limited as it is definite. The official actions of the State of Washington herein complained of are repugnant to the rule of economic unity, are not justified by the Twenty-first Amendment, and violate the specific provisions of both the Privileges and Immunities Clause of Article IV, Section 2, and the Commerce Clause. These points will be discussed in order.

1. Privileges granted its own citizens by the State of Washington are denied to citizens of California in violation of the Privileges and Immunities Clause of Article IV, Section 2.

The California wine industry comprises 97 individual proprietorships, 61 partnerships and 103 corporations. Included in the corporations are 31 co-ops. Thus some 60% of the producers of California wine are individual citizens of California, entitled to the privileges and immunities guaranteed by Article IV, Section 2, of the Constitution, which provides:

> "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

The intendment and effect of this provision has long since been established, in an open-ended manner, by the Court. We need not go beyond the Court's opinion in *The Slaughterhouse Cases,* 83 U.S. 36. Searching for the meaning of Article IV, Section 2, the Court quoted from the 4th of the Articles of Confederation:

> "that the better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, the free inhabitants of each of these States, . . . shall be entitled to all the privileges and immunities of free citizens in the several States; and . . . shall enjoy therein all the privileges of *trade and commerce,* subject to the same duties, impositions, and restrictions as the inhabitants thereof respectively" (Emphasis added).

The Court said that Article IV, Section 2, was the corresponding provision of the Constitution which superseded the Articles of Confederation, and that

> "There can be but little question that the purpose of both these provisions is the same, and that the privileges and immunities intended are the same in each. In the article of the Confederation we have some of these specifically mentioned. . . ." (83 U.S. at 75).

As to Article IV, Section 2, the Court said:

> "Its sole purpose was to declare to the several States, that whatever those rights, as you grant or establish them to your own citizens, or as you limit or qualify, or impose restrictions on their exercise, the same, neither more nor less, shall be the measure of the rights of citizens of other States within your jurisdiction" (83 U.S. at 77).

Dissenting on points not relevant here, Mr. Justice Field stated specifically:

> "It will not be pretended that under the fourth article of the Constitution any State could create a monopoly in any known trade or manufacture in favor of her own citizens, . . . She could not confer, for example, upon any of her citizens the sole right to manufacture shoes, or boots, or silk, or the sole right to sell those articles in the State so as to exclude non-resident citizens from engaging in a similar manufacture or sale. The non-resident citizens could claim equality of privilege under the provisions of the fourth article with the citizens of the State exercising the monopoly as well as with others, and thus, as respects them, the monopoly would cease" (83 U.S. at 101).

What the State of Washington has done with the privilege of selling wine to licensed retailers in that state falls squarely within the ban of Article IV,

Section 2. As already noted, Washington makes no distinction based upon the place of origin of wine, either in the right of licensed retailers to sell wine or in the right of its citizens to purchase and consume wine. It is only in the distribution channels through which wine reaches the licensed retailers, in sales to them, and in the promotion of sales to them, that the State of Washington makes a distinction based on the origin of wine. Here Washington law has conferred exclusively upon producers of Washington wine four privileges—and they are privileges, and not matters of right:

(a) The privilege of selling their wines to licensed retailers either directly or through the medium of any of the 135 privately-owned wine wholesalers licensed for that purpose (Rev. Code Wash. § 66.24.210);

(b) The privilege of soliciting orders for their wine from retail licensees (Rev. Code Wash. § 66.28.050);

(c) The privilege of directly contacting retail licensees in any manner and by any means to induce or promote the sale of their respective wines (Wash. Liq. Cont. Bd. Reg. No. 113(d)); and

(d) The privilege of determining the prices at which their respective wines are sold to licensed retailers (Wash. Liq. Cont. Bd. Reg. No. 81).

That these privileges are granted to *citizens* of the State of Washington can readily be demonstrated. Section 66.24.210 begins:

> "All wines manufactured or produced in domestic wineries may be sold by the manufacturer or producer thereof direct to persons . . . [hold-

ing retail or domestic wine wholesalers' licenses or to other domestic wineries]."

The statute defines a "domestic winery" as a "place where wines are manufactured or produced within the state . . ." (Rev. Code Wash. § 66.04.110). In point of fact, all of the producers of Washington wine are either Washington corporations or partnerships comprising individual citizens of the State of Washington.

Each of the above-mentioned privileges is expressly denied to citizens of California who, as individual proprietors or as individual members of partnerships, comprise 60% of the producers of California wine (Rev. Code Wash. §§ 66.24.210, 66.28.050, Reg. No 113(d)).

The denial of these privileges works a discrimination and competitive economic disadvantage to California citizens. Hence, it is clearly in violation of Article IV, Section 2, Clause 1. *The Slaughter House Cases,* supra; *Blake v. McClung,* 172 U.S. 239; *Ward v. Maryland,* 12 Wall. 418. Violation of this provision was not discussed by the Court in any of its prior opinions construing the Twenty-first Amendment.

One aspect of the relationship between the Privileges and Immunities Clause of Article IV, Section 2, and the Twenty-first Amendment should be noted carefully. It cannot be doubted but that the latter was adopted in aid of the effectuation of the self-determined policy of each state concerning prohibition of the consumption of alcoholic beverages by its citizens. As Justice Black has stated:

> ". . . Though the precise amount of power it has left in Congress to regulate liquor under the Commerce Clause has not been marked out by decisions, this much is settled: *local,* not national, regulation of the liquor traffic is now the general Constitutional policy . . ."
>
> (Concurring opinion, *Carter v. Virginia,* 321 U.S. 131, 138; Emphasis added).

The application of the Privileges and Immunities Clause of Article IV, Section 2, to state liquor legislation cannot possibly do violence to this intendment of the Twenty-first Amendment. Peculiarly, this clause makes the *local policy* of a given state, as established by its own laws with respect to its own citizens, the full and complete measure of the protection against discrimination which it grants to citizens of other states. It follows that the clause cannot be invoked to coerce, modify or frustrate the policy of a state concerning prohibition, or the lack of it, within its boundaries.

2. The discriminations against interstate commerce are a violation of the Commerce Clause which has no sanction in the Twenty-first Amendment.

This case is unique. A state has prescribed a system of free competition in the distribution and marketing of a locally-made product and prescribed that the same product entering the state in interstate and foreign commerce should be subjected to monopoly control for the purpose and with the effect of thereby protecting local industry.

There is scarcely need of citing authority that such discrimination would violate the Commerce Clause, if the product involved were anything but an alcoholic beverage. See *Baldwin v. Seelig,* 294 U.S. 511. Since the commodity here involved is wine, however, we must squarely consider the decisions of the Court which construe the Twenty-first Amendment. The leading cases in this field are four. Of these, three involved liquor taxes *(State Board of Equalization v. Young's Market,* 299 U.S. 59; *Indianapolis Brewing Co. v. Liquor Commission,* 305 U.S. 391; *Joseph S. Finch & Co. v. McKittrick,* 305 U.S. 395); the fourth involved a requirement that liquor transported into the state must have its brand name registered in the United States Patent Office, liquor produced within the state being free from such requirement *(Mahoney v. Joseph Triner Corp.,* 304 U.S. 401).

California will not ask the Court to overrule these or any of its other previous decisions construing the Twenty-first Amendment. The uniqueness of the facts here makes this unnecessary.

California will, however, request the Court to reconsider some of the more extreme implications of the language used in these earlier opinions. It has no hesitancy in so doing, because here involved is the construction of the Constitution of which the Court is the final arbiter.

This Court has on a number of occasions distinguished or severed earlier decisions interpreting constitutional provisions in the light of new developments, e.g., *Brown v. Board of Education,* 347 U.S. 483; *United States v. Southeastern Underwriters,* 322

U.S. 533. See also *Smith v. Allwright,* 321 U.S. 649, 665-666 and the dissenting opinion of Mr. Justice Brandeis in *Burnett v. Coronado Oil & Gas Co.,* 285 U.S. 393, 405. The Twenty-first Amendment itself, and not the language of decisions construing it, controls. As Justice Frankfurter pointed out in *Graves v. New York ex rel. O'Keefe,* 306 U.S. 466, 491-92, the Constitution itself is the "ultimate touchstone of constitutionality".

The Court's opinions of the 1930's were written before there was any experience with statutes such as those of Washington which California challenges here. The domestic wine industry was small in 1936; the pattern of discriminatory restraints had not emerged. We believe that the intervening time has shown that it is appropriate to reconsider the question for the following reasons:

(a) The Twenty-first Amendment was not enacted to justify a system of discriminatory economic restraints on foreign wine, the purpose and effect of which is merely to favor the local wine industry.

It will be the position of California that the clear purpose of the Twenty-first Amendment was to enable states which voted to continue prohibition or regulation of consumption after the repeal of the Eighteenth Amendment to make that decision effective by preventing an influx of liquor from non-prohibition states.

The Amendment was designed, in the words of Senator Blaine of Wisconsin, principal spokesman for the bill which was later adopted as the Amendment, "to insure the so-called dry States against the

importation of intoxicating liquors into those States" (76 Cong.Rec.4141).[2]

Furthermore, the purport and language of the Twenty first Amendment was drawn directly from the Webb-Kenyon Act, 37 Stat. 699, as amended in 1935, 49 Stat. 877, 27 U.S.C. § 1, note, which prohibits:

> "the shipment or transportation . . . of any . . . intoxicating liquor of any kind, from one State . . . into any other State . . . to be received, possessed, sold, or in any manner used, either in the original package or otherwise, *in violation of any law* of such State" (Emphasis added).

Since its enactment, the phrase "in violation of any law of such state" as used in Webb-Kenyon has been declared by the courts to mean "proper laws". Even before the enactment of the Twenty-first Amendment, Section 1 was judicially held not to authorize discriminations against interstate commerce not required for the purpose of regulating the liquor traffic, *Evansville Brewing Ass'n v. Excise Commission,* 225 Fed. 204 (1915); *Brennan v. Southern Express Co.,* 106 S.C. 102, 90 S.E. 402. As stated in the latter case:

> "It [the Webb-Kenyon Act] was not intended to confer and did not confer upon any state the power to make injurious discriminations against the products of other states which are recognized

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[2]This was the view of contemporaneous authorities. Notes, 7 So. Calif. L. Rev. 230 (1934); 28 Ill. L. Rev. 950 (1934); 83 U. of Pa. L. Rev. 510 (1935). Independent writers who have retraced the legislative history are in accord with this position. Comment, The *Twenty-first Amendment versus the Interstate Commerce Clause,* 55 Yale L.J. 815 (1946); Carr, *Liquor and the Constitution,* 7 L. & Contemp. Prob. 709, 710 (1940).

> **as subjects of lawful commerce by the law of the state making such discriminations . . ." (90 S.E. at 404).**

The courts continued to adhere to this interpretation of Webb-Kenyon after the Twenty-first Amendment. *Dugan v. Bridges,* 16 F. Supp. 694; App. Dism. 300 U.S. 684; *Commonwealth v. One Dodge Motor Truck,* 326 Pa. 120, 191 Atl. 590. This has been consistently the policy of Congress; it was so recognized by this Court in considering the earlier Wilson Act *(Scott v. Donald,* 165 U.S. 58, 100).

The Twenty-first Amendment uses the phraseology of Webb-Kenyon in its own text. In carrying the statutory language forward into the Amendment, Congress must be considered as having thereby adopted the existing case-law interpretations of the statute. The Congressional policy with respect to the Amendment can, therefore, only have been one of condemnation of state laws which prescribe competitive distribution for local products and monopoly control over out-of-state products, where both are "subjects of lawful commerce by the law of the state making such discrimination."

(b) The Twenty-first Amendment did not Lodge Plenary Power over Commerce in Alcoholic Beverages in the States.

It would be anomalous indeed to interpret the Amendment otherwise. Such an interpretation would construe a provision of the Constitution in disregard of its context and in such a way to invalidate other provisions which from time immemorial have been the very keystone of constitutional policy. Nor do we

think that *Young's Market* really supports such a position. It does not mean that the restraints of our federal system on parochial state economic legislation are to be completely ignored in the field of alcoholic beverages. In *Young's Market* the Court flatly denied that its decision involved a declaration "that the [Twenty-first] Amendment has, in respect to liquor, freed the states from all restrictions upon the police power to be found in other provisions of the Constitution" (299 U.S. at 64).

The history of the Twenty-first Amendment does, as indicated, make clear that its draftsmen meant merely to arm the states with control over importation of alcoholic beverages where such control would do service in the name of a state-wide rule of prohibition or other regulation of consumption. Liquor laws were not meant to be called to the aid of parochial business preferences.[3] *Young's Market* involved a $500 fee for license to import beer into California. Justice Brandeis specifically stated that the issue was whether such a burden, admittedly in conflict with the Commerce Clause regardless of the nature of the regulation of sellers of local beer, was sanctioned by the Twenty-first Amendment. As he pointed out, "the case does not present a question of *discrimination prohibited* by the commerce clause" (299 U.S. at 62; emphasis added).

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[3]Two years after the adoption of the Twenty-first Amendment, speaking through Justice Cardozo, the Court was of the view that ". . . In licensing or prohibiting the sale of intoxicating liquors a state does not attempt to neutralize economic advantages belonging to the place of origin . . ." (*Baldwin v. Seelig*, supra, 294 U.S. at 528.)

The instant case, however, involves not merely a burden, but an economic discrimination, with the intent and effect, not to reduce or control liquor consumption but to place local industry in a favored position to cater to existing demand.[4] The Twenty-first Amendment did not legitimatize whatever legislation a state might enact, so long as the subject matter is liquor. Liquor is admittedly in a different category from other articles moving in interstate commerce. The precise limits of state authority have not yet been marked out by the cases. But it is clear that that authority is still subject to a residuum of limitations under the terms of the federal system as set forth in the Constitution. See *United States v. Frankfort Distilleries,* 324 U.S. 293, 299; *Carter v. Virginia,* 321 U.S. 131.

This case challenges a system of import regulation, the function and purpose of which is not to regulate the traffic or consumption of alcoholic beverages; at the retail level no discrimination is made between Washington and California wine. The effect of the Washington statutes and regulations is exhausted as soon as wine is in the hands of retailers licensed to sell wine to the consuming public.

In short, California will take the position that the Twenty-first Amendment does not validate the Washington system because that system is not designed "to permit the State to control the liquor traffic . . ." (see concurring opinion of Justice Frankfurter in

[4]During the past 20 years, as a result of the trade barriers erected by Washington, the growth of the Washington wine industry has been at the expense of interstate commerce in California wine. (See statistics, Complaint, par. 7, 13, 17).

United States v. Frankfort Distilleries, supra, 324 U.S. 300).

Examination of the cases construing the Twenty-first Amendment shows that the Court has not, as some have supposed, declared that in a proper case it would refuse to apply the usual test of determining whether the legislation in question has any relation to its legitimate objectives. California contends that this is just such a case and that no such relationship exists.

The constitutional significance of discriminatory trade barriers was not raised in *Young's Market,* while in *Triner,* which did involve discrimination, the challenge was based solely on the Equal Protection Clause. Hence, the issues raised herein are open. This Motion for Leave to File its Complaint by the State of California is intended to raise that ripe justiciable controversy.

D. Liquor administration officials of substantially all states favor abolition of trade barriers.

In 1951, the two largest national organizations most directly concerned with state control of intoxicating liquor instituted a joint effort to make a study of trade barriers. These organizations were the National Conference of State Liquor Administrators and the National Alcoholic Beverage Control Association. The first of these was formed in Chicago in 1934. Twenty-nine states and the City of Baltimore hold membership. These member states are those in which the alcoholic beverage business is conducted as a private enterprise under a system of licensing. The second

association, the NABCA, was organized in 1937. It represents sixteen of the seventeen monopoly states in which the states themselves participate to various degrees in the alcoholic beverage business.

These two organizations formed a joint committee composed of state liquor officials to report on trade barriers in the industry. Their report was published in 1952. It unanimously condemned local discrimination against liquor imported from other states. It defined the purpose of the Twenty-first Amendment as follows:[5]

> "Under the 21st Amendment, each state has the right to determine what is needed in the way of regulation and control of the alcoholic beverage business within its borders to protect the health, welfare, safety and morals of its people.
>
> "As recorded in our first report, we found that 'alcoholic beverage control should be commensurate with its purposes.' *It is significant that nowhere has it ever been expressly stated or even implied that a purpose of control is to protect home industry or agriculture from out of state competition.* Yet it is evident that by statute, rule and regulation individual states have attempted to justify measures that contribute nothing to control. This, we find, is a perversion of the high purposes and sound logic of state control and we denounce it unequivocally.
>
> "We believe that the purposes of the 21st Amendment to vest complete control of the alcoholic beverage industries in the individual states

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[5] "*Trade Barriers Affecting Interstate Commerce in Alcoholic Beverages*", Joint Committee of the States to Study Alcoholic Beverages (Cleveland, 1952), p. 12.

must not be distorted by legislative enactments or judicial interpretations, and that the states should continue in possession of the rights and prerogatives of alcoholic beverage control. We are equally certain, however, that in the enjoyment and exercise of these rights the states should honestly respect the purposes of that Amendment and that in shaping control procedures they should be guided accordingly. We fear that continued refusal to limit their interference with interstate commerce to measures which are reasonably related to control and which are motivated by a bona fide desire to accomplish its proper objectives will lead ultimately to countermeasures which will adversely affect the rights of the States in the field of control."

Findings such as these should be given weight. They indicate clearly that those who are experts in the field do not think that the Twenty-first Amendment should be held to sanction discriminatory restraints like those here challenged.

CONCLUSION.

For the reasons stated, the Motion for Leave to File a Complaint should be granted.

Dated, February 11, 1958.

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Certificate of Service

The undersigned, a member of the bar of the Supreme Court of the United States, and one of the counsel of record for the plaintiff, hereby certifies:

That on the 11th day of February, 1958, he served the within and foregoing "Brief in Support of Motion for Leave to File a Complaint" upon the State of Washington, the defendant, as prescribed by Rules 9 and 33 (par. 3(b)) of said Court:

He deposited at the post office at San Francisco, California, two copies of the said Brief, securely enclosed in an envelope, air mail postage prepaid, addressed to each of the following officials of said defendant State at his post office address, as shown below:

Honorable Albert D. Rosellini,
Governor of the State of Washington,
State Capitol,
Olympia, Washington.

Honorable John J. O'Connell,
Attorney General of the State of Washington,
State Capitol,
Olympia, Washington.

Edmund G. Brown.